627.

SUPREME COURT OF THE UNITED STATES.

No. 103.

THOMAS COOKENDORFER, PLAINTIFF IN ERROR,

vs.

ANTHONY PRESTON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA, IN AND FOR THE COUNTY OF WASHINGTON.

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To the honorable James M. Wayne, associate justice, &c., &c.

The petition of Thomas Cockendorffer respectfully presents and shews to your honor, that, at a circuit court of the District of Columbia, for the county of Washington, at March term, 1843, judgment was rendered against your petitioner in an action brought against him by one Anthony Preston, as will more fully appear by a copy of the record and proceedings in said cause, herewith exhibited.

The said Thomas Cockendorffer assigns for error in the rendition of said judgment—

1. That the court, on the trial of the said case, admitted illegal testimony to go to the jury, notwithstanding the same was objected to by the counsel of your petitioner.

2. That the court refused to instruct the jury, at the prayer of the counsel for defendant, which refusal your petitioner represents was against law.

3. In the rendition of the judgment set forth in said record.

Your petitioner respectfully suggests that the points so ruled by the court against him, are all points of great importance and general interest. Wherefore he prays your honor will direct that a writ of error be allowed and issued under the terms, and upon the conditions, prescribed by law.

THOMAS COCKENDORFFER,
By RICHARD S. COXE, *Atty. for defdt.*

The above petition being read, and the record considered, the clerk is authorized and directed to issue the writ of error, &c., on the terms and conditions required by law.

Jan'y 9, 1844. JAMES M. WAYNE,
Associate justice Sup. C. United States.

UNITED STATES OF AMERICA, *sct:*

The President of the United States, to the honorable the judges of [L. S.] the circuit court of the United States for the District of Columbia, in the county of Washington, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Anthony Preston, plaintiff, and Thomas Cookendorfer, defendant, a manifest error hath happened, to the great damage of the said Thomas Cookendorfer, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right, and according to the laws and the custom of the United States, should be done.

Witness the honorable Roger B. Taney, Chief Justice of said Supreme Court.

Issued this 14th day of April, 1843.

W. BRENT,
Clk. Ct. Ct. Dist. Col. county of Washington.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to Anthony Preston, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, on the Monday of next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the District of Columbia, in the county of Washington, wherein Thomas Cookendorfer is plaintiff in error, and you are defendant in error, to shew cause, if any there be, why judgment rendered against the said Thomas Cookendorfer should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. W. Cranch, chief judge of the circuit court of the District of Columbia, this 14th day of April, 1843.

W. CRANCH.

Know all men by these presents, that we, Thomas Cookendorfer and John Brown, are held and firmly bound unto Anthony Preston, in the full and just sum of eight hundred dollars, lawful money of the United States, to be paid to the said Anthony Preston, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this fourteenth day of April, in the year of our Lord one thousand eight hundred and forty-three.

Whereas lately, at a circuit court of the United States for the District of Columbia, sitting for the county of Washington, in a suit depending in said court between the said Anthony Preston, plaintiff, and the said Thomas Cookendorfer, defendant, judgment was rendered against the said Thomas Cookendorfer, and he having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Anthony Preston, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of January next.

Now, the condition of the above obligation is such, that if the said Thomas Cookendorfer shall prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue.

THOS. COOKENDORFER, [SEAL.]
JOHN BROWN. [SEAL.]

Signed, sealed, and delivered, in presence of—
H. A. WEEDEN.

Approved: W. CRANCH.
Copy test: W. BRENT, *Clk.*

Style of court.

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of March, being the twenty-seventh day of the same month, in the year of our Lord one thousand eight hundred and forty-three, and of the independence of the United States the sixty-seventh.

Present: William Cranch, chief judge; the hon. Buckner Thruston and James S. Morsell, asst. judges; Alexander Hunter, esq., marshal; William Brent, clerk.

In the record of the proceedings of the said court, among others, are the following, to wit:

Parties.

ANTHONY PRESTON,
vs.
THOMAS COOKENDORFER.

Be it remembered that, heretofore, to wit, on the twenty-third day of February, in the year of our Lord one thousand eight hundred and forty-two, the said plaintiff, by Joseph H. Bradley, esquire, his attorney, prosecuted and sued forth, out of the circuit court here, the United States writ of capias ad respondendum, directed to the marshal of the District of Columbia, in the words, and of the tenor following, to wit:

Capias ad respondendum.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the marshal of the District of Columbia, greeting:

We command you that you take Thomas Cookendorfer, if he shall be found within the county of Washington in your said district, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held for the county aforesaid at the city of Washington, on the fourth Monday of March next, to answer unto Anthony Preston in a plea of trespass on the

case, and so forth. Hereof fail not at your peril, and have you then and there this writ.

Witness W. Cranch, esq., chief judge of our said court, at the city of Washington, the 11th day of January, anno domini one thousand eight hundred and forty-three.

Issued the 23d day of February, 1842.

W. BRENT, *Clk.*

BRADLEY.

And the aforesaid plaintiff, by his attorney aforesaid, on the day of prosecuting and suing forth of the aforegoing writ, declared against the said defendant in the plea aforesaid, in form following, to wit:

Nar.

DISTRICT OF COLUMBIA, *Washington county, to wit:*

Thomas Cookendorfer, late of Washington county, was attached to answer unto Anthony Preston in a plea of trespass on the case, and so forth. And whereupon the said plaintiff, by Joseph H. Bradley, esquire, his attorney, complains, that whereas, heretofore, to wit, on the 17th day of May, in the year of our Lord one thousand eight hundred and thirty-nine, at the county aforesaid, Elizabeth T. Arguellis made her certain note in writing, commonly called a promissory note, her own proper handwriting being thereunto subscribed, bearing date the day and year aforesaid; and thereby, on the first day of February then next, promised to pay to the defendant, by the name of Thomas Cookendorfer, or order, the full and just sum of three hundred dollars, current money of the United States, for value received, negotiable and payable at the Bank of Washington, and then and there delivered the said note to the said defendant, to whom, or to whose order, the payment of the said sum of money, in the said note mentioned, was to be made afterwards, and before the payment thereof, and before the time limited in the said note for the payment thereof, to wit, on the day and year aforesaid, at the county aforesaid, endorsed the said note, his own proper handwriting being thereon subscribed; and thereby ordered and appointed the said sum of money, in the said note mentioned, to be paid to the said plaintiff, and then and there delivered the said note, so endorsed, to said plaintiff.

And the said plaintiff avers that afterwards, and after the expiration of the time limited in the said note for the payment thereof, to wit, on the 4th day of February, in the year 1840 aforesaid, he showed and presented the said note, with the endorsement so made thereon as aforesaid, to the said Bank of Washington, and then and there required the said Bank of Washington to pay the same; but the said Bank of Washington, nor any person or persons on its behalf, did not then, or at any time since, pay the same, or any part thereof, to the said plaintiff, but then and there wholly refused so to do; of all which premises the said defendant afterwards, to wit, on the day and year aforesaid, at the county aforesaid, had notice.

By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said sum of money in the said note mentioned to the said plaintiff according to the tenor and effect of the same, and the said endorsement thereon; and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the plaintiff, according to the tenor and effect thereof, and the endorsement thereon, whenever afterwards he should be thereto requested.

And whereas the said defendant afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, was indebted unto the said plaintiff in another sum of three hundred dollars, like money, for the like sum of money by the said plaintiff to and for the use of the said defendant before that time paid, laid out, and expended, at the special instance and request of the said defendant; and for other by the said plaintiff before that time lent and advanced to the said defendant at his special instance and request; and for other money by the said defendant before that time had and received to the use of the said plaintiff; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiff to pay him the said last mentioned sum of money when afterwards he should be thereunto required.

Yet the said defendant, the said sums of money herein mentioned, or any part thereof, (although often thereto requested, to wit, on the day and year aforesaid, at the county aforesaid, and often afterwards,) has not paid, but the same, or any part thereof, to pay has hitherto wholly refused, and still does refuse, to the damage of the said plaintiff in the sum of six hundred dollars, current money; and therefore he brings suit, and so forth.

John Doe and Richard Roe, pledges, &c.

JOS. H. BRADLEY,
For the plaintiff.

At which mentioned fourth Monday of March, in the year of our Lord one thousand eight hundred and forty-two, and the day of the return of the aforegoing writ, comes again into the circuit court here the said plaintiff, by his attorney aforesaid, and the marshal of the district aforesaid, to whom the aforegoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

Marshal's return—"Cepi." A. HUNTER,
Marshal.

Defendant's appearance and rule—special bail.

And the said defendant being called appears in court here, by Richard S. Coxe, esq., his attorney; and thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court

here that the said defendant give special bail in the plea aforesaid, or in default thereof be committed to the custody of the marshal of the district aforesaid.

Special bail.

Whereupon a certain Thomas H. Bowen, present here in court in his proper person, (with the consent of the said plaintiff, by his attorney aforesaid,) undertakes for the said defendant that, in case the aforesaid plaintiff shall recover judgment against the said defendant in the plea aforesaid, or that the said defendant shall be therein legally convict, that then the said defendant shall pay the condemnation of the court thereupon, or render his body to the custody of the marshal of the district aforesaid in satisfaction thereof, or that he, the said Thomas H. Bowen will do the same for him.

Rule plea and imparlance to Nov. term, 1842.

And thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here that the said defendant answer to the declaration aforesaid of the said plaintiff, in the plea aforesaid, or judgment by the court here will be entered against him in default thereof; and the said defendant, by his attorney aforesaid, defends the force and injury when, &c., and prays leave of the court here to imparle until the fourth Monday of November next, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, and to him it is granted; the same day is given to the said plaintiff also.

Non assumpsit, issue joined, venire facias.

At which mentioned fourth Monday of November, in the year of our Lord one thousand eight hundred and forty-two, to which said day the said defendant had leave to imparle, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, comes again into the circuit court here as well the said plaintiff by his attorney aforesaid, as the said defendant by his attorney aforesaid, and the said defendant by his attorney aforesaid, as before, defends the force and injury when, and so forth, and saith that he did not assume upon himself in manner and form as the aforesaid plaintiff above against him hath complained, and of this he puts himself upon the country. And the said plaintiff, by his attorney aforesaid, in like manner, and so forth; therefore let a jury therein appear before the court here on the fourth Monday of March next, by whom, &c., and who neither, &c., to recognise, &c., because as well, &c., and the same day is given to the said parties then and there, and so forth.

And now at this day, to wit, the said fourth Monday of March, in the year of our Lord one thousand eight hundred and forty-three, comes again into the circuit court here as well the said plaintiff by his attorney aforesaid, as the said defendant by his said at-

torney; whereupon, for trying the issue aforesaid, it is ordered by the court here that twelve persons, from the pannel of petit jurors returned to the court here by the marshal of the District of Columbia, be called; who, being called, come—

Jury.

1 Wm. N. Waters,	7 Vincent King,
2 Samuel Handy,	8 Charles C. Fulton,
3 F. S. Myer,	9 James Clephane,
4 A. B. Lindsay,	10 Hudson Garland,
5 Charles Bradley,	11 James Summers,
6 John Rayne,	12 Edward Lacey.

Verdict, damages.

Who, being empannelled and sworn to say the truth in the premises, upon their oath do say, that the said defendant did assume upon himself in manner and form as the aforesaid plaintiff within against him hath complained, and they assess the damages of the said plaintiff, sustained by reason of the non-performance of the promise and assumption aforesaid, to the sum of three hundred dollars, with interest from 4 February, 1840, and one dollar and seventy-five cents, cost of protest.

Judgment on verdict.

Therefore, it is considered by the court here that the said plaintiff recover against the said defendant as well the said sum of three hundred dollars, with interest as aforesaid and costs of protest, in form aforesaid assessed to be sustained by occasion of the non-performance of the promise and assumption aforesaid, as also the sum of twenty-three dollars and thirteen cents by the court here unto him the said plaintiff on his assent adjudged for his costs and charges by him about his suit in this behalf laid out and expended; and the said defendant in mercy, &c.

Test: W. BRENT, *Clerk.*

Memorandum—Before the jurors aforesaid retired from the bar of the court here the said defendant, by his attorney aforesaid, filed in court here the following bill of exceptions, to wit:

Defendant's bill of exceptions—*Defendant's bill of exceptions.*

ANTHONY PRESTON,
vs.
THOMAS COOKENDORFER.

On the trial of this cause the handwriting of the maker and endorser of the note in the declaration mentioned was admitted, and the plaintiff, to maintain the issue on his part joined, offered George Sweeny, who was admitted to be a notary public for the county of Washington, District of Columbia, lawfully commissioned and

sworn, and by him they offered to prove that he, as such notary, was required by the Bank of Washington (who then held the said note for collection) to demand payment of the note mentioned in the declaration, and the said note was delivered to him by the said bank; and he did thereupon, on the 4th day of February, 1840, present the said note at the said bank, and did demand payment thereof at the said bank, and he was answered by the proper officer of the bank "*that there were no funds there for it*;" that he, the said notary, did, on the next day, to wit, the 5th day of February, 1840, deliver to the defendant a notice in writing, which notice being now produced to the witness by the defendant, is in the words and figures following:

Notice of 5 *February*, 1840.

WASHINGTON, *Feb'y 5th*, 1840.

SIR: A note drawn by E. T. Arguelles, dated the 17th May, 1839, for three hundred dollars, payable at 1–4 Feb'y, 1840, due, and by you endorsed, and for which you are accountable to the president and directors of the Bank of Washington, has been this day protested for non-payment.

Your obedient servant,

GEORGE SWEENY, *Notary public.*

THOS. COOKENDORFER, esq.

And he did also, on the said fifth day of February, 1840, extend and record in his notarial register the protest of the said note, which is in the words and figures following:

Protest.

$300. WASHINGTON, *May* 17, 1839.

On the first day of February next I promise to pay to Thomas Cookendorfer, or order, three hundred dollars, for value received, negotiable and payable at the Bank of Washington.

(Signed,) E. T. ARGUELLES.

(Endorsed)—THOS. COOKENDORFER,
ANTHONY PRESTON.

DISTRICT OF COLUMBIA,
Washington county, sct.

Be it known that on the fourth day of February, 1840, I, George Sweeny, notary public, by lawful authority duly commissioned and sworn, dwelling in the county and district aforesaid, at the request of the president and directors of the Bank of Washington, presented at the said bank the original note whereof the above is a true copy, and demanded there payment of the sum of money in the said note specified, whereunto I was answered "there are no funds here for it."

Therefore I, the said notary, at the request *of* aforesaid, have protested, and by these presents do solemnly protest, against the draw-

er and endorser of the said note, and all others whom it doth or may concern, for all costs, exchange, re-exchange, charges, damages, and interests suffered and to be suffered for want of payment thereof.

In testimony whereof, I have hereunto set my hand and affixed my seal notarial, this fifth day of February, 1840.

[SEAL.] GEORGE SWEENY, *Notary public.*

Protesting, $1 75.

Recorded in protest book G. S. No. 3, page .

And the said witness further testified that he copied the form of the said notice from a form used by Michael Nourse, one of the oldest notaries in the city, and largely employed as notary, and that he made the demand and gave the notice in this case according to his usual practice, and that his said practice conformed, so far as he knows and believes, to the practice of the other notaries in the city of Washington.

And the plaintiff offered further evidence tending to prove the said practice of said notaries to be according to the statement made by Mr. Sweeny, and that the usual practice was, when a notice was to be sent abroad, to put it into the post office, and date it on the third or last day of grace; but when the notices were to be delivered in the city of Washington, a latitude was allowed to the notary either to deliver the notice on the third or last day of grace, or the day after the last day, and in all cases to date the notice on the day of its delivery, and the usage is to extend the protest on the day on which the notice is given as in this case, stating the demand to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated.

And the said George Sweeny on cross examination testified that he usually acted on behalf of the said Bank of Washington at its request, as the notary in regard to notes and bills in said bank, and that he had given a bond with security to said bank, in the penal sum of $10,000, for the faithful performance of his duty as notary public in regard to said business, and that the note in controversy had been deposited by plaintiff in said bank for collection.

And the counsel for the defendant objected to the admissibility and competency of said George Sweeny as a witness, and the court overruled the said objection, and permitted the said Sweeny to be sworn, and to testify as aforesaid to the jury, to which the defendant by his counsel excepted, and prayed the court to seal this bill of exceptions, which is done accordingly.

And the said counsel for the defendant further objected to the admissibility and competency of the said testimony upon the subject of the practice and usage spoken of by the witness, but the court overruled the objection, and suffered the said testimony to go to the jury; whereupon the said counsel excepted.

And the said counsel for the defendant thereupon moved the

court to instruct the jury that the said evidence was not sufficient, if believed to be true, to shew that payment of said note had been duly demanded and refused, and that due notice of such dishonor had been given to defendant so as to bind him.

But the court refused to give such instruction.

To each of which rulings of the court, in permitting the evidence as aforesaid to go to the jury, in refusing the instruction as prayed, the defendant by his counsel excepts, and prays the court to seal this bill of exceptions, which is accordingly done this 7th day of April, 1843.

W. CRANCH, [SEAL.]
JAMES S. MORSELL, [SEAL.]
Test: W. BRENT, *Clerk*.

Appeal to Supreme Court, clerk's certificate.

And whereas afterwards, to wit, on the thirteenth day of April, in the year of our Lord one thousand eight hundred and forty-three, the said defendant by his attorney aforesaid produced and filed in court here the United States writ for the correcting of errors of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia, in the county of Washington, and in pursuance thereof, and according to the form and effect of the law in such cases made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is transmitted to the said Supreme Court accordingly.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the said circuit court at the city of Washington, this 13th day of September, 1843.

[L. S.]

W. BRENT, *Clerk*.

Filed 15th Jan'y, 1844.